STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 1, 2014
v	No. 308609 Wayne Circuit Court
MICHAEL RAY SMITH, Defendant-Appellant.	LC No. 11-006623-FC

Before: M. J. KELLY, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to commit criminal sexual conduct (CSC) involving sexual penetration, MCL 750.520g(1), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced, as a habitual offender, second offense, MCL 769.10, to 28 months to 15 years' imprisonment for the assault conviction, 9 months to 7 ½ years' imprisonment for the felon in possession conviction, and two years' imprisonment for the felony-firearm conviction.[1] Defendant appeals by right, and we affirm.

Defendant's conviction arises from the sexual assault of the victim. The victim, defendant's cousin, was watching television and drinking alcohol with defendant in his bedroom. Defendant told the victim that he was sorry for what he was about to do and she might not want to come around anymore, but he did not care. He grabbed the victim, and they struggled. Defendant pulled a gun from the top of the bed and pointed it at the victim. Defendant ordered the victim to undress, sexually assaulted and choked the victim. He also threatened her with a bottle of hot sauce. When defendant left the bedroom to use the bathroom, the victim placed the gun under the mattress. When defendant returned to the bedroom and asked about his gun, the victim ran from the home wearing only a shirt and socks. The victim identified her clothes, shoes, and a bottle of hot sauce in photographs taken of defendant's bedroom. The victim fled to the nearby home of a friend and called the police. Defendant's theory of the case was that any sexual act was consensual, the victim was not credible in light of the different information

[1] Defendant was acquitted of three counts of first-degree CSC, MCL 750.520b, kidnapping, MCL 750.349, and felonious assault, MCL 750.82.

provided to investigating personnel, and the victim was calm during the 911 call. Defendant now appeals.

I. Defendant's Brief on Appeal

Defendant first alleges that the trial court's erroneous instruction for certain elements of first-degree CSC irreparably confused the jury and deprived him of due process and a fair trial. We disagree. A claim of instructional error involving a question of law is reviewed de novo, but the trial court's conclusion that a jury instruction applies to the facts of the case is reviewed for an abuse of discretion. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010). Imperfect instructions are not erroneous if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007). The defendant bears the burden of proving that a claim of instructional error resulted in a miscarriage of justice. *Dupree*, 486 Mich at 702. When a defendant challenges an instruction for a crime he was not convicted, reversible error has not occurred. See *People v Major*, 85 Mich App 583, 585; 272 NW2d 143 (1978). Waiver is the intentional relinquishment or abandonment of a known right, and a defendant who waives a right extinguishes the underlying error precluding appellate review. *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012). A party may not approve of a course of action taken in the trial court and object on appeal. See *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011). To hold otherwise would allow counsel to harbor error as an appellate parachute. *Id*. at 505.

Defendant's challenge to the instruction was waived. Trial counsel was given the opportunity to object to the instructions by the trial court, and he expressed satisfaction with the charge to the jury by having no objections. *Kowalski*, 489 Mich at 505. Moreover, defendant failed to meet his burden of proving that any alleged instructional error resulted in a miscarriage of justice, *Dupree*, 486 Mich at 702, because he was acquitted of the offenses for which he claims instructional error, *Major*, 85 Mich App at 585. Therefore, this issue does not entitle defendant to appellate relief.

Next, defendant contends that his conviction for felony-firearm must be reversed and the sentence vacated because the gun was suppressed at trial. He further asserts that his felony-firearm conviction must be reversed because there was no evidence that the gun was in operable condition. We disagree.[2] As an initial matter, we note the prosecutor and defense counsel stipulated that the gun would not be admitted into evidence and that certain photographs would be admitted into evidence.[3] Stipulations of fact are binding upon the court, *People v Metamora*

[2] Defendant only argues that the felony-firearm conviction should be vacated, and therefore, we do not address the felon in possession of a firearm conviction.

[3] The prosecutor indicated her "belief" regarding the admissibility and propriety of the seizure of the gun. The defense then questioned whether defendant gave the police his consent to enter his home. The trial court admonished the parties regarding the failure to file motions in accordance with the calendar conference order and refused to hear any motions or conduct an evidentiary hearing. The parties then stipulated to the exclusion of the gun and the admission of the photographs.

Water Serv, 276 Mich App 376, 385; 741 NW2d 61 (2007), and therefore, a challenge to the admission or exclusion of evidence premised on the stipulated facts is without merit. Furthermore, a defendant may be convicted of felony-firearm or felon in possession of a firearm regardless of whether the firearm itself is recovered, see *People v Hayden*, 132 Mich App 273, 296; 348 NW2d 672 (1984), and operability is not a requirement for felony-firearm and felon in possession convictions, *People v Peals*, 476 Mich 636, 652-653; 720 NW2d 196 (2006). This claim of error is without merit.

II. Standard 4 Brief

A. Illegal Search

Defendant raises numerous issues in a Standard 4 Brief, Administrative Order, No. 2004-6. First, he argues that the officers illegally used his outstanding traffic warrant as a pretext to search his bedroom. Defendant also argues that the officers otherwise violated the Fourth Amendment by searching his bedroom such that Officer Metcalf's testimony about viewing the victim's clothing on the floor, as well as the clothing itself, should have been excluded. We disagree. We review these unpreserved arguments for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "[A] constitutional right may be forfeited by a party's failure to timely assert that right." *Id*. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. The determination, whether plain error affected substantial rights, involves a showing of prejudice. *Id*. That is, the error must have affected the outcome of the proceedings. The defendant has the burden of persuasion with regard to the prejudice requirement. *Id*. If a defendant establishes these three requirements, the appellate court nonetheless must exercise its discretion in determining whether reversal is appropriate. *Id*. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence.'" *Id*. An objection to conflicting testimony is properly directed to the weight of the evidence, not its admissibility. *People v Hintz*, 62 Mich App 196, 203; 233 NW2d 228 (1975). Witness credibility presents an issue for the trier of fact, and conflicts in the evidence must be resolved in favor of the prosecution. *People v McGhee*, 268 Mich App 600, 624; 709 NW2d 595 (2005).

Defendant's reliance on traffic stop authority is misplaced. In analyzing police actions under the Fourth Amendment, courts should consider only the objective facts, not the subjective intentions of the officers. See *Whren v United States*, 517 US 806, 813; 116 S Ct 1769; 135 L Ed 2d 89 (1996); *People v LaBelle*, 478 Mich 891, 891; 732 NW2d 114 (2007). Accordingly, whether the officers intended to investigate and arrest defendant because of the traffic warrant, or because of the CSC allegations, is irrelevant. The only issue is whether the officers' conduct was objectively justified, and in this case, the facts show that the officers were objectively justified in arresting defendant, given the victim's allegations. We, therefore, turn to the issue of whether the officers were objectively justified in entering the bedroom without a warrant.

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v New York*, 445 US 573, 586;

100 S Ct 1371; 63 L Ed 2d 639 (1980) (citation and quotation marks omitted). However, police officers may enter and search a residence without a warrant to conduct a protective sweep which is "quick and limited" for the "purpose of ensuring the safety of police officers and other persons." See *People v Cartwright*, 454 Mich 550, 557; 563 NW2d 208 (1997); *People v Snider*, 239 Mich App 393, 410-411; 608 NW2d 502 (2000). Evidence viewed by the police officers during a valid "protective search" is admissible notwithstanding the absence of a warrant. *Cartwright*, 454 Mich at 559.

Here, Officer Johnson testified that he heard running water in the residence which caused Officer Metcalf to search the upstairs to check for the presence of another person. The officer observed women's clothing in plain view in the bedroom. The officers acted permissibly under the circumstances. See *Cartwright*, 454 Mich at 559. Moreover, the defense stipulated to the admission of the photographs with the victim's clothing. *Metamora Water Serv*, 276 Mich App at 385. As a result, no error occurred through admission of these photographs. See *Kowalski*, 489 Mich at 505 n 28. Defendant failed to demonstrate plain error affecting substantial rights. *Carines*, 460 Mich at 763.[4]

B. Tampering With the Crime Scene

Defendant submits that his convictions should be vacated because the record shows that the officers improperly tampered with the alleged crime scene, his bedroom. We disagree. We review this unpreserved issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Defendant's contention that police misconduct occurred with regard to the location of the clothing is without merit. Officer Metcalf testified in light of his recollection of an event that occurred months earlier. The attorneys did not question the evidence technician about whether the clothing was moved to obtain a photograph. However, there is nothing to suggest that the police improperly tampered with the scene by moving the jeans and the jacket from the floor to the bed. Any disparity in the officer's testimony regarding the location of the victim's clothing in the bedroom presented an issue of weight, not admissibility, for the jury to resolve. *McGhee*, 268 Mich App at 624; *Hintz*, 62 Mich App at 203. This claim of error does not entitle defendant to appellate relief.

C. Perjured Testimony

Defendant argues that the prosecution violated his due process rights by knowingly presenting perjured testimony. We disagree. We review this unpreserved issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

[4] Defendant also asserted that, because the gun was suppressed, all other evidence had to be suppressed. The trial court never suppressed the gun. Rather, the parties agreed that the gun would not be admitted. The legality of the admission of the gun was not submitted to and ruled upon by the trial court.

In *People v Gratsch*, 299 Mich App 604; 831 NW2d 462, vacated in part on other grounds, ___ Mich ___; 838 NW2d 686 (2013), this Court stated as follows:

> A defendant's right to due process guaranteed by the Fourteenth Amendment is violated when there is any reasonable likelihood that a conviction was obtained by the knowing use of perjured testimony. Accordingly, a prosecutor has an obligation to correct perjured testimony that relates to the facts of the case or a witness's credibility. When a conviction is obtained through the knowing use of perjured testimony, a new trial is required only if the tainted evidence is material to the defendant's guilt or punishment. So whether a new trial is warranted depends on the effect the misconduct had on the trial. The entire focus of [the] analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability. [*Id*. at 619-620 (citations and quotation marks omitted).]

Defendant contends that the prosecutor committed misconduct because the gun found under the mattress in his bedroom did not bear his fingerprints, knowingly allowed the witnesses to present perjured testimony, and admitted false photographs. The victim's testimony regarding the use of a gun to perpetrate the crime is sufficient, and a gun with fingerprints need not be admitted. See *Hayden*, 132 Mich App at 296. Other than defendant's blanket assertions, there was no evidence that the prosecutor knowingly admitted false evidence or testimony. Rather, as previously stated, any disparity in the testimony by the witnesses presented an issue of weight, not admissibility, for the jury to resolve, *McGhee*, 268 Mich App at 624; *Hintz*, 62 Mich App at 203, and defense counsel challenged the credibility of the witnesses in light of the conflicting testimony. This claim of error does not entitle defendant to appellate relief.

D. *Brady*[5] Violations

Defendant alleges that the prosecution violated *Brady* by failing to disclose exculpatory evidence. We disagree. We review this unpreserved issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Under *Brady*, a defendant has a due process right to obtain impeachment and exculpatory evidence from the prosecution. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). A defendant must prove the following four elements to establish a *Brady* violation:

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Id*. at 281-282.]

[5] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

Defendant argues that the prosecution failed to disclose exculpatory evidence when it only revealed the results of one DNA test to defendant. Defendant contends that he gave DNA samples to law enforcement on three separate occasions: June 13, 2011; June 27, 2011; and September 2011.[6] However, there is no evidence that law enforcement conducted more than one DNA test. Accordingly, defendant failed to establish the first element of a *Brady* violation. And, even if law enforcement did conduct more than one DNA test, the results would have been cumulative or irrelevant, particularly in light of defendant's assertion that he engaged in consensual sex with the victim.

Defendant further argues that the prosecution failed to disclose the victim's statement that she gave to the prosecution and the photographs before trial. Apparently, defendant is referring to the oral conversations between the prosecution and the victim about the contents of the victim's testimony, and any written notes thereof. This Court has held that the contents of such conversations between the prosecution and a witness are generally not subject to discovery. See *People v Holtzman*, 234 Mich App 166, 189; 593 NW2d 617 (1999). Defendant asserted that he was entitled to the victim's statements because they related to the allegations in dispute. However, these allegations were unambiguously inculpatory, not exculpatory, so *Brady* was inapplicable. See *Lester*, 232 Mich App at 281. Moreover, the record does not support the assertion that defense counsel received the photographs just prior to trial in light of the immediate stipulation to admit the photographs.

Defendant submits that the prosecution failed to disclose the results of the fingerprint analysis on the gun indicating that his fingerprints were not present. However, the record does not suggest that the fingerprint analysis was unavailable to defendant before trial, and therefore, defendant failed to establish the second and third elements of a *Brady* violation. Moreover, given that the gun itself was voluntarily excluded, the results of the fingerprint analysis would not have been exculpatory, much less outcome determinative, because admission of the fingerprint analysis would have informed the jury that a gun was found in defendant's bedroom. Thus, defendant has failed to establish the first and fourth elements of a *Brady* violation as well. Defendant failed to establish plain error. *Carines*, 460 Mich at 763.

E. Ineffective Assistance Of Counsel

Next, defendant asserts that trial counsel provided ineffective assistance in several respects. We disagree. "Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). Whether a defendant received ineffective assistance of counsel presents a question of constitutional law reviewed de novo. *Id*.

Under the federal and state constitutions, a criminal defendant has the right to the effective assistance of counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing US Const, Am VI; Const 1963, art 1, § 20. "To establish ineffective assistance of

[6] The record suggests that the September 2011 DNA sample identified by defendant was actually a blood draw to test for the presence of disease.

counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). "A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Id*. "[D]ecisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic decisions with the benefit of hindsight." *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The burden of establishing the factual predicate for a claim of ineffective assistance is on the defendant. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant contends that trial counsel was ineffective for failing to move to suppress evidence from the bedroom, failing to seek discovery of the victim's statements to the prosecutor, failing to investigate or call witnesses, and failing to challenge the modified crime scene. We disagree. Defendant failed to meet his burden of presenting the factual predicate for these claims because they do not constitute mistakes apparent on the record. *Hoag*, 460 Mich at 6; *Lockett*, 295 Mich App at 186. In light of defendant's theory that any sexual act was consensual, the victim's clothing in the bedroom was inconsequential, and defense counsel questioned the officers regarding the disparity of the location of the clothing. As indicated, the prosecutor was not required to disclose communications with the victim, and defense counsel need not raise a meritless objection. *Ericksen*, 288 Mich App at 201. The failure to call witnesses is presumed to be a matter of trial strategy, *Dunigan*, 299 Mich App at 589-590, and defendant failed to present any foundation regarding what those witnesses would have stated at trial, *Hoag*, 460 Mich at 6. Accordingly, these challenges to the representation by counsel at trial do not afford defendant appellate relief.

Defendant further submits that defense counsel failed to test the prosecution's case, had a conflict of interest, and breached his ethical duty to advocate on defendant's behalf. See *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This argument is meritless. There is nothing in the record to suggest that defense counsel had a conflict of interest. Further, defense counsel adequately tested the prosecution's case by cross examining the prosecution's witnesses at length and by giving sound opening and closing arguments. Defense counsel had a coherent strategy that undermined the credibility of the victim's allegations by identifying the differences in each of her previous statements, thus showing that defense counsel tested the prosecution's case and advocated on defendant's behalf. It is particularly noteworthy that defendant was acquitted of five of the eight charges, including the four most serious charges. This successful result is unquestionably inconsistent with the assertion that defense counsel was somehow cooperating with the prosecution.

F. Jury Note

Defendant contends that the trial court erred in responding to the jury's note. We disagree. We review this unpreserved issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). "This Court reviews jury instructions in their entirety to determine if there is error requiring reversal." *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Defendant argues that the statement, "I can't answer any questions," was erroneous. While this statement could be problematic when considered in isolation, a fair review of the trial court's response as a whole indicates that the trial court was referring to questions about facts not in evidence. Indeed, immediately after the trial court stated that it could not answer any questions, a juror asked the trial court what is considered evidence. The juror's prompt question shows that the jury was fully aware that it could ask the trial court questions.

Defendant further argues that the trial court erroneously instructed the jury that it would require 90 days to prepare a transcript of the testimony. It is unclear how this instruction was erroneous, as defendant does not actually dispute that a transcript would require about 90 days to prepare. It appears that the substance of defendant's argument is that the trial court unreasonably discouraged the jury from reviewing witness testimony.

Under MCR 2.513(P), a trial court has the discretion to refuse a jury's request to review a witness's entire testimony. See *People v Holmes*, 482 Mich 1105, 1105; 758 NW2d 262 (2008) (discussing prior court rule). Here, the jury asked the trial court to review the entire testimony of the victim and the police officers, which constituted the bulk of the testimony in this four-day trial. The trial court would have been within its discretion to simply refuse the request. See *id*. Nevertheless, the trial court offered to have the court reporter read the testimony to the jury. The trial court even emphasized that it was willing and able to do so. No error occurred.

Defendant briefly suggests that the trial court was biased against him. However, defendant has failed to show any actual bias or prejudice. See *Cain v Dep't of Corrections*, 451 Mich 470, 509; 548 NW2d 210 (1996). There is no indication that the trial court acted improperly at any point during these proceedings.[7]

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood

[7] The trial court's statement during sentencing about disbelieving one of the officers who testified would, at most, show bias and prejudice in defendant's favor.